

6 OCAHO 844

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

March 15, 1996

UNITED STATES OF AMERICA,))
Complainant,))
v.))
) 8 U.S.C. §1324b Proceeding
) Case No. 96D00025
ZABALA VINEYARDS,)) 94B00151
Respondent.))
_____))

NOTICE

The Order and Decision on Attorney's Fees issued on March 12, 1996 is corrected to reflect OCAHO docket number 96D00025 in lieu of docket number 94B00151.

SO ORDERED.

Dated and entered this 15th day of March, 1996.

MARVIN H. MORSE
Administrative Law Judge

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March 12, 1996

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 94B00151
ZABALA VINEYARDS,)
Respondent.)
_____)

DECISION AND ORDER ON ATTORNEYS' FEES

On December 13, 1995, I issued a final decision and order in favor of Respondent, denying liability for violation of 8 U.S.C. §1324b(6) and dismissing the complaint of the United States. 6 OCAHO 830 (1995), *appeal filed*, No. 96-70118 (9th Cir. 1996). By Request dated January 5, 1996 (filed January 17, 1996), Respondent asks that attorneys' fees and costs be awarded pursuant to 8 U.S.C. §1324(b)(h). On January 19, 1996, referring to unusual time strictures resulting from the government's partial shutdown for budget authorization reasons, weather induced shutdowns and an intervening holiday, Complainant requested an extension until February 5 for its response. That request was granted by Order issued on January 19, 1996.

On February 5, 1996, Complainant filed its Reply to the fee shifting Request. Complainant argues that as this case arose in California, its disposition is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. Complainant is correct. 8 U.S.C. §1324b(i). Citing *General Dynamics Corp. v. United States*, 49 F.3d 1384 (9th Cir. 1995), Complainant argues that Ninth Circuit jurisprudence forecloses recovery of attorneys' fees in §1324b proceedings notwithstanding that on the merits the employer may have been the prevailing party against the government.

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In *General Dynamics*, denying a petition for review of a decision by the administrative law judge who rejected an application by an employer who successfully defended against a §1324(b) government action, the Ninth Circuit held that Congress failed to waive sovereign immunity for such liability. *General Dynamics*, 49 F.3d 1384, 1385, 1387–88. As Complainant correctly notes, as Congress has not amended §1324(b)(h), I am obliged to deny Zabala's request for an award of attorneys' fees.

Whatever rule may apply in those circuits which have not reached the question presented here, it is clear that in cases arising in the Ninth Circuit the current text of §1324(b)(h) forecloses fee shifting against the government. As to sovereign immunity as a bar to 8 U.S.C. §1324(b) liability on the merits, see *Hensel v. Oklahoma City Veteran's Affairs Medical Center*, 38 F.3d 505 (10th Cir. 1994). *Accord*, *Kasathsko v. Internal Revenue Service*, OCAHO Case No. 95B00132 (March 1, 1996) (Order Granting Respondent's Motion to Dismiss). *But see*, *Mir v. Bureau of Prisons*, 3 OCAHO 510 (1993); *Roginsky v. Department of Defense*, 3 OCAHO 426 (1992). In any event, I am unaware of any authority for an award to the prevailing party of costs as distinct from fee shifting.

This final order of the administrative law judge on the Request for award of fees and costs denies that Request.

SO ORDERED.

Dated and entered this 12th day of March, 1996.

MARVIN H. MORSE
Administrative Law Judge